similarly I would order that each party bears his own costs in respect of this appeal.

*Appeal dismissed.*

Solicitors: *Dr Yaacob & Ismail Advocates; Lim Tan & Partners Advocates.*

Reported by *Yap Shao Sin*

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## Hsu Seng v Chai Soi Fua

HIGH COURT (KUCHING) — SUIT NO KG 312 OF 1987
HAIDAR J
6 JULY 1989

*Civil Procedure — Summary judgment — Striking out defence — Delay in filing application — Whether oral explanation for delay acceptable — Admissibility of oral evidence — Omission to plead allegation in defence — Whether can be made good by affidavit evidence — No reasonable defence — Scandalous, frivolous, vexatious — Prejudice, embarrass or delay of fair trial — Abuse of process — Evidence Act 1950, s 92 — Rules of the High Court 1980, O 14 & O 18 r 19(1)*

*Contract — Assignment — Agreement for sale and purchase of property — Time of the essence — Failure of performance — Whether agreement voidable — Effect of void agreement — Agreed liquidated damages — Whether reasonable compensation — Contracts Act 1950, ss 40, 56(1), 65 & 66*

By a deed of assignment dated 28 May 1985, one Hsu Hua, with the defendant's consent, assigned to the plaintiff all his right, share, interest and liabilities in a written agreement between himself and the defendant for the purchase of a certain property. Pursuant to the agreement, Hsu Hua had paid the defendant a sum of $72,000 as a deposit and/or part payment towards the purchase price of $120,000. Under cl 5 of the agreement, the defendant undertook to complete the road construction and obtain the documents of title to the property within a stipulated period. In the event that the defendant failed to do so, the plaintiff was, under cl 6, to allow the defendant a further six months to perform during which agreed liquidated damages of $1,000 per month were to be paid to the plaintiff. If the defendant still failed to perform, it was further provided that the sum of $72,000 would be refunded to the plaintiff as agreed liquidated damages together with the value of improvements made by the plaintiff to the property. Clause 13 provided that time was to be of the essence of the agreement. Upon the defendant's failure to perform the aforesaid obligations, the plaintiff commenced proceedings for the refund of $72,000 and damages and applied for judgment under O 14, alternatively under O 18 r 19(1), of the Rules of the High Court 1980.

The defendant contended that (a) the O 14 application should be dismissed in view of the delay in filing of about six months from the filing of the defence; (b) the principle governing an application under O 14 or O 18 was fundamentally the same, ie it should be made promptly and had to be a plain and obvious case; (c) the plaintiff had been verbally informed that it was impossible for the defendant to complete the road construction and obtain the documents of title within the time stipulated; (d) upon being informed as aforesaid, the plaintiff had agreed not to demand or sue for the refund and damages as long as the property was transferred to him upon the final payment of the purchase price; and (e) as the road construction had been taken over by the district council, the defendant had no control over the same.

**Held**, allowing the plaintiff's application:

(1) As the facts pertaining to the delay are within the personal knowledge of counsel, the oral explanation for the same could be accepted by the court although ideally such explanation should be by affidavit to enable the other party if he wishes, to challenge the facts relied on.

(2) Assuming the court to be wrong as to the mode of explanation for the delay, the plaintiff's alternative application under O 18 r 19 could proceed as the action had not yet been set down for trial.

(3) As time was of the essence of the agreement, upon the defendant's failure to perform her obligations, the agreement became voidable by the plaintiff in accordance with s 56(1) of the Contracts Act 1950. Upon the plaintiff's exercise of his option to annul the agreement, it follows that any person who has received any advantage under such agreement which becomes void, is bound to restore it to the person from whom it was received. Accordingly, the $72,000 paid should be refunded to the plaintiff.

(4) As the terms of the agreement had been reduced into writing, s 92 of the Evidence Act 1950 rendered inadmissible oral evidence to contradict, vary, add to or subtract from its terms. The alleged representation to the plaintiff that the defendant's obligations could not be performed is therefore inadmissible. In any event, in view of the circumstances, it is not plausible that such representation was made.

(5) As it was the court's opinion that no such representation was made, the issue of estoppel fails.

(6) The defendant's allegation that the road construction had been taken over by the district council should not be considered as it was not pleaded in the defence and such omissions could not be made good by affidavit evidence.

(7) The distinction between liquidated damages and penalty has ceased to be of great legal importance as the result in either case is that the court must determine reasonable compensation. Had the plaintiff placed the sum of $72,000 on fixed deposit instead of paying the defendant, the interest which would accrue would have been more than the sum of $6,000 liquidated damages agreed upon. As such, this agreed sum was reasonable compensation.

(8) It is obvious and clear that the defence discloses no reasonable defence, is scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action and is an abuse of the process of the court.

(9) Judgment would be entered for the plaintiff for the refund of $72,000, agreed liquidated damages of $6,000, interest on $78,000 at 8% pa from the date of judgment to payment and costs.

**Cases referred to**

1 *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd* [1986] 2 MLJ 134 (folld)
2 *Huo Heng Oil Co (EM) Sdn Bhd* v *Tang Tiew Yong* [1987] 1 MLJ 139 (refd)

3 *Bank Bumiputra Malaysia Bhd & Anor* v *Lorrain Esme Osman* [1987] 2 MLJ 633 (folld)
4 *Jamshed K Irani* v *Burjorji Dhunjibhai* [1915] LR 43 1A 26 (refd)
5 *Muralidhar Chatterjee* v *International Film Co Ltd* [1942] LR 70 1A 35 (refd)
6 *United Malayan Banking Corp Bhd* v *Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206 (refd)
7 *Development and Commercial Bank Bhd* v *Abdullah & Anor* [1989] 1 CLJ 190 (refd)

**Legislation referred to**
Contracts Act 1950 ss 40, 56(1), 65, 66
Evidence Act 1950 s 92
Rules of the High Court 1980 O 14, O 18 r 19(1)

*Cur Adv Vult*

**Haidar J**: This is an application by way of summons-in-chambers dated 28 March 1988 (encl 11) by the plaintiff under O 14, or alternatively under O 18 r 19(1), of the Rules of the High Court 1980. It is supported by the affidavit of the plaintiff himself, Hsu Seng.

The brief facts are as follows. By a deed of assignment dated 28 May 1985 made between Hsu Hua @ Hsu Ping and the plaintiff, Hsu Seng, the said Hsu Hua in consideration of the sum of $1 paid to him by the plaintiff, assigned to the plaintiff all his right, share, interest and liabilities in the written agreement (exh 'HS2') made between himself and the defendant. The assignment was made with the consent of the defendant. The assignment is exhibited to the affidavit as 'HS1'.

Under exh 'HS2' Hsu Hua, pursuant to cl 2(a), paid a sum of $72,000 to the defendant as deposit and/or part payment towards the purchase price of two sublots referred to as sublots 1 and 2 being part of lot 229 block 207, Kuching North Land District and situate at Poh Kwong Park, off Green Road, Kuching. The agreed price for the two sublots is $120,000. The defendant acknowledged receipt of $72,000.

Under cl 5 thereof the defendant agrees and undertakes to complete the construction of the roads within six months from the date of the road plan approval and to obtain the document of titles in respect of the two sublots within six months of the date of completion of the road construction. The approval of the road plan was made on 24 January 1985 (see exh 'HS3'). In accordance with cl 5, the roads should be completed by 24 July 1985 and thereafter the defendant should, within six months expiring on the 24 January 1986, have obtained the document of titles in respect of the two sublots.

In the event the defendant fails or is unable to obtain the document of titles in respect of the sublots within the time stipulated in cl 5, the plaintiff shall, under cl 6 thereof, allow the defendant a further period of six months ('the grace period'), during which the defendant agrees to pay the plaintiff $1,000 per month as agreed liquidated damages. In the further event that the defendant still fails or is unable to obtain the document of titles in respect of the two sublots within 'the grace period', the defendant agrees in addition to the sum of $72,000 as agreed pre-estimated liquidated damages, to refund the plaintiff the value of improvements he had made to the two sublots provided that it shall not prejudice the plaintiff's right to apply for specific performance.

The defendant, it would appear, failed to keep to her side of the bargain and hence this action filed by the plaintiff for the refund of $72,000 paid to the defendant and for damages.

The defendant opposed the application of the plaintiff and apart from raising a preliminary issue of delay, her counsel advanced three grounds in support thereof as raised in the defence.

*Preliminary issue of delay*

The defendant contended that there was a delay of about six months of the filing of the O 14 application after defence had been filed and such delay must be explained by the plaintiff which the plaintiff failed to do so and as such the O 14 application should be dismissed. Mr John Lim, counsel for the plaintiff, said that he was caught by the objection raised by the defendant's counsel. I am of the view that there is no question of Mr John Lim being caught by such an objection as it is well established by a number of authorities that if there is a delay in an O 14 application the onus is on the plaintiff to explain such delay. According to Salleh Abas LP in *Krishnamurthy & Anor* v *Malayan Finance Corp Bhd*[1] at p 134, the law as to the time when an application for an O 14 judgment could be made is settled law and at p 135 his Lordship went on to say:

> The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in *McLardy* v *Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue Malaysia* v *Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh* v *Woh Heng Mining Kongsi* [1978] 2 MLJ 267.

In this case the plaintiff filed the writ on 8 June 1987 and the defendant filed the defence on 6 October 1987 and the O 14 application was filed on 28 March 1988 — a delay of about six months. Mr John Lim, counsel for the plaintiff, sought to explain orally the delay by saying that his firm had difficulty in tracing certain documents. It would seem that such explanation could be accepted as reasonable but can counsel explain such delay orally or should it be by way of affidavit? I am unable to find any authority on this

point. The nearest authority that I could think of is the case of *Huo Heng Oil (EM) Sdn Bhd* v *Tang Tiew Yong*[2] where Chong Siew Fai J accepted the oral explanation of counsel and said at p 140:

> At the hearing of this appeal, counsel for the appellant stated that the reasons for the delay in making the application were that the managing director of the appellant-company was away travelling and that accounts were involved and needed time to prepare. In the light of what was stated, I am of the view that the delay is not inordinate and does not defeat the application.

As the facts pertaining to the delay are within the personal knowledge of counsel, I do not see why such oral explanation could not be accepted though of course, ideally, such explanation should be by way of affidavit evidence so that the other party may, if he so wishes, challenge the facts relied on by the plaintiff as being incorrect or unreasonable.

Assuming I am wrong in my view as to the mode of explanation for the delay, Mr John Lim said that the plaintiff's application is also under O 18 r 19 and therefore the plaintiff is not precluded from proceeding with the summons in chambers application. However, Mr TO Tan, counsel for the defendant, contended that the principle governing an O 14 application or O 18 application is basically or fundamentally the same, that is, it should be made promptly and it has to be a plain and obvious case and relied on the case of *Bank Bumiputra Malaysia Bhd & Anor* v *Lorrain Esme Osman*[3] where at p 635, Zakaria Yatim J said:

> The rule does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial. See *The Supreme Court Practice 1985* (Vol 1) at p 304.

In this application, the action has not been set down for trial and as such the plaintiff, in my view, should not be shut out and hence the defendant fails on this preliminary issue.

*Ground (1)*

From the pleadings it seemed obvious to me that the defendant has breached the agreement by not completing the roads in time as stipulated and failing to give the titles to the two sublots as promised up to the time of the hearing of this application. It should be noted that under cl 13 of the agreement ('HS 2') 'time whenever mentioned shall be of the essence of the agreement'. The law relating to time for performance is prescribed under s 56(1) of the Contracts Act 1950 which reads:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Where time is expressly stipulated, Visu Sinnadurai in *Sale and Purchase of Real Property* at p 394 stated:

> If there is an express stipulation making time of the essence of the contract, the courts will give effect to such an express intention of the parties. Such an intention must be expressly and clearly stated by the parties.

The author went on to quote a passage from pp 32-33 of the judgment of Viscount Haldane in *Jamshed K Irani* v *Burjorji Dhunjibhai*.[4] He went on further at p 395 to say:

> Therefore, in contracts where the phrase 'time is of the essence' is employed, it is generally accepted that the parties in these cases have clearly intended that the provision dealing with time is an essential term of the contract. Failure to comply with such a provision would render the contract voidable under s 56 of the Contracts Act 1950. The innocent party may rescind the contract and sue for damages.

It is not disputed that the defendant could not complete the road construction within the time stipulated though she said that it was beyond her control and the road construction was taken over by the council. I will deal with this matter later in my judgment. The Privy Council in *Muralidhar Chatterjee* v *International Film Co Ltd*[5] held that a contract which may be 'put to an end' under s 39 of the Indian Contracts Act 1872 (in pari materia to our s 40 Contracts Act 1950) is voidable, and s 64 of the Act (in pari materia to our s 65 Contracts Act 1950) applies to cases of rescission under s 39 (our s 40). According to Pollock and Mulla in explaining the scope of s 64 (equivalent to our s 65) at p 531:

> The use of the word 'voidable' is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void.

It follows, in my view, that any person who has received any advantage under the agreement or contract that becomes void is bound to restore it to the person from whom he received it. (See s 66 of the Contracts Act 1950.) It would be a case of unjust enrichment at the expense of the plaintiff, an innocent party. Therefore the plaintiff should be entitled to a refund of the sum of $72,000 paid to the defendant.

Now, the defendant alleged in her defence and affidavit that the plaintiff was informed verbally that it was impossible for her (the defendant) to complete the road construction within six months from the date of approval of the road plan and to obtain the titles of the two sublots (see para 3 of the defence and para 4 of the defendant's affidavit (encl 13)). The plaintiff denied such allegation (see paras 7 and 8 of the plaintiff's affidavit (encl 11) and the plaintiff's affidavit in reply (encl 17)). Basically, the terms of the parties' agreement having been reduced into writing,

oral evidence is not admissible for the purpose of contradicting, varying, adding to or subtracting from its terms (see s 92 of the Evidence Act 1950). It thus appears that the defendant's allegations are inadmissible unless they come within any of the proviso to s 92 of the Evidence Act 1950. I must say that it is not plausible that the defendant could have verbally informed the plaintiff as alleged when knowing fully well she will be subjected to penalties should she fail to adhere to the terms of the agreement. It is to be noted that the approval of the road plan was given on 24 January 1985 (exh 'HS3') and the consent was only executed on 28 May 1985 (exh 'HS1') which was about four months after the approval and yet the defendant would choose to leave such an important variation of an otherwise agreed and written clause to a purely verbal statement. Further it should be noted that the whole area to be subdivided is only 0.80 acres, more or less, to be subdivided into five subdivided lots for which the plaintiff has agreed to purchase two subdivided lots and the area could hardly be said to be a big area such that it is impossible for her to complete the construction of the roads within six months from the date of road plan approval as provided in cl 5 of the agreement. As such the allegations put forth by the defendant are not plausible.

The defendant further alleged in paras 5, 6 and 7 of her affidavit (encl 13) that the Kuching Rural District Council had taken over the construction of the road and as such she had no control over the completion of the roads by the council. This allegation is irrelevant and should not be considered by the court as such allegation was not pleaded in the defence and as such the defects or omission in the defence could not be made good by affidavit evidence (see *United Malayan Banking Corp Bhd* v *Palm & Vegetable Oils (M) Sdn Bhd & Ors*[6] and *Development and Commercial Bank Bhd* v *Abdullah & Anor*[2]).

*Ground (2)*

The issue of estoppel relied on by the defendant hinges on the alleged oral representation made by the defendant to the plaintiff on the impossibility of the performance by her of the road construction and the alleged agreement by the plaintiff not to demand or sue for the refund and the agreed pre-estimated damages under cll 4 and 6 of the agreement so long as the two subdivided lots would be transferred to him upon the payment of the final balance of the purchase price (see para 11 of the affidavit of the defendant at encl 13 — the word 'defendant' is wrongly typed and it should read 'plaintiff' instead). As I formed the opinion that there was no such representation by the defendant, for the reasons set out by me, the issue of estoppel naturally fails.

*Ground (3)*

The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation. Can the sum of $1,000 per month for six months agreed by the parties as liquidated damages be considered reasonable compensation? Generally it is open to the court to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the court to exceed what is reasonable. In considering whether the compensation is reasonable a number of factors may be taken into account. First, the contract involves a sum of $120,000 out of which $72,000 was paid by way of deposit cum part payment and this works out to roughly 60% of the purchase price and is a substantial sum. It was paid on 28 August 1982 (see p 2 of the agreement — 'HS2') and until now the said sum has not been refunded to the plaintiff and therefore the plaintiff is deprived of the use of the said sum on the failure of the defendant to fulfil the terms of the agreement. If the said sum is put into fixed deposit then, the interest that will accrue would certainly be more than the sum of $6,000 agreed as liquidated damages and in any event the period is only limited to six months. In the circumstances, I am of the opinion that the stipulated liquidated damages of $6,000 is a reasonable sum and the plaintiff should be entitled to the said sum.

On the pleadings and the affidavit evidence, this is an obvious and clear case whereby the defence:

(i) discloses no reasonable defence;
(ii) is scandalous, frivolous or vexatious;
(iii) may prejudice, embarrass or delay the fair trial of the action; and
(iv) is an abuse of the process of the court.

I would accordingly allow the application and order that judgement be entered against the defendant as follows:

| | |
|---|---|
| (a) Refund of the deposit | $ 72,000 |
| (b) Agreed liquidated damages at $1,000 per month for six months | $ 6,000 |
| (c) Interest at 8% pa from date of judgment to date of full payment for the said sum of $78,000 | |
| (d) Costs | |

From the submission of counsel for the plaintiff, it would seem that the plaintiff is not pursuing the sum of $72,000 as liquidated damages in his summons-in-chambers application and it is then only proper in my view that the claim of the said sum be proven by the plaintiff.

*Application allowed.*

Solicitors: *Tiong, Lim, Wong & Co; Tan & Yap.*

Reported by *Michele Rasanayagam*